



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-05-1

### QUESTION

May a full-time municipal employee be privately compensated to prepare lines for municipal athletic fields, and perform other maintenance functions, when the municipal permits issued to private parties for the use of the fields require the private parties to have certain line-painting and maintenance functions performed?

### ANSWER

No. Section 17(a) of G. L. c. 268A prohibits a municipal employee from receiving private compensation to perform preparation and maintenance tasks required by a municipal permit in which the municipality is a party and in which the municipality has a direct and substantial interest, unless the compensation is authorized by a municipal by-law or other law.

### FACTS

You are a full-time employee of the Town.

On your own time, using your own equipment, you would like to earn money providing various services to private organizations that use Town grounds and playing fields. For example, you would apply lines to an athletic field, rake baseball diamonds, set up tables, chairs, tents and public address systems, pick up trash and clean up the fields following the events.

Whenever a private organization wishes to use a Town field, the organization must comply with conditions under a permit from the Town's Park and Recreation Commission. To schedule the use of a field, an organization must apply to the Park and Recreation Commission. The Town discontinued the past practice of lining athletic fields for community groups and does not provide materials for painting lines or marking diamonds. Due to budget cuts, the Town discontinued providing materials but "will layout fields and paint lines at the beginning of each season, only once. From that time on, any marking will be the individual groups [sic] responsibility."

However, the Town must approve all field linings and "organizations are not permitted to do any type of maintenance on fields without permission from the Parks Division and the Park and Recreation Commission."

The type of paint product must be approved, in advance, by the Parks Superintendent. According to the Town's Director of Public Works, the type of paint must be an approved field-marking paint, which does not damage grass. The Manual states that a community group may hire a private company or individual to do the lining that had been previously approved by the Superintendent. "The company or individual must provide proof of insurance to the community group, with a copy provided to the Town . . . . The community group liaison must remain in

contact with the private company or individual and with the [Parks] Superintendent to insure collaboration between the mowing and lining schedule.”

In order to obtain a permit, the organization must also comply with an Agreement, entered into by the organization and the Park and Recreation Commission. The Agreement reiterates the above-described requirements and imposes several conditions such as removing equipment, clothing and trash from the field at the end of the event. Extra work related to repairing an organization’s unauthorized maintenance work is billed to the organization. The Park and Recreation Commission imposes charges on groups using fields. The Town requires all groups that use fields to provide proof of insurance by submitting a certificate of insurance to the Director of Park and Recreation.

According to the Town, it devotes a substantial amount of money each year just to do the initial line painting. The School system uses the same fields, so, along with the use by numerous private groups, the fields receive significant wear and tear. The Town has devoted substantial financial resources to field improvements over the last ten years, according to the Director of Park and Recreation.

Previously, the Park and Recreation Commission had a policy that allowed users to request maintenance services through the Superintendent. If the users chose to use Town services, the cost of overtime would be paid by the user into the Park and Recreation’s Gift Fund. Alternatively, the policy provided that Town staff may do work for an organization, on their own off-time, but may not use Town supplies, vehicles or equipment.

Based on that policy, you decided to provide services to private organizations, using your own equipment and your own time. You state that the Town initially allowed you to perform services for the organizations. Some time later, you were informed that you could not work for the organizations but, you report, were told that the Town would defer to a decision by the State Ethics Commission regarding your ability to perform these services. You received informal advice from the Commission’s Legal Division, advising you that G. L. c. 268A, § 17 prohibited your conduct, and have asked the full Commission to review the informal advice.

The Town’s rules now state, “A community group may not hire a Town Public Works employee to do maintenance, including lining, on his/her own time. This practice has been allowed in the past, but in accordance with The Commonwealth of Massachusetts State Ethics law, it must be discontinued.”<sup>1/</sup>

## **DISCUSSION**

As a full-time Town employee, you are a municipal employee<sup>2/</sup> subject to the conflict of interest law. Section 17(a) of G. L. c. 268A prohibits a municipal employee from receiving compensation<sup>3/</sup> from anyone other than the Town “in relation to any particular matter”<sup>4/</sup> in which the Town is a party or in which it has a “direct and substantial interest.”<sup>5/</sup>

As the Commission and the courts have often advised, § 17 is intended to prohibit misconduct arising from divided loyalty *and* influence peddling.<sup>6/</sup> “The Legislature was entitled to [preclude] all potential conflicts before they become a reality and before damage, even unwittingly, has been done. The Legislature may have recognized that it is not always easy to tell when an actual conflict has arisen. These ‘section[s] of the statute [reflect] the old maxim that “a man cannot serve two masters.” [They seek] to preclude circumstances *leading to* a conflict of loyalties by a public employee.”<sup>7/</sup>

“The citizens of the Commonwealth reasonably expect public officials to act for the common good, rather than solely to benefit a special interest or to advance their own aims or fortunes.”<sup>8/</sup> Outside employment can raise these issues if the outside “activity might be construed to be an official act” of the municipality or if “it involves services closely related to official duties.”<sup>9/</sup> “Accordingly, there are concerns that a municipal employee may not only favor a private interest over his municipality’s interest in a particular matter but also be in a position to exert influence [over his municipality] on behalf of his private client”<sup>10/</sup> or for his private interests, such as business opportunities, regardless of the financial magnitude of those interests.<sup>11/</sup>

The permit the Park and Recreation Commission issues to allow the use of a field, and the Agreement, are particular matters in which the Town is a party. In addition, these particular matters are also of direct and substantial interest to the Town because they involve municipal action and govern the use of municipal property.<sup>12/</sup> As described above, the Town has created an extensive and detailed set of rules governing the use of its athletic fields.<sup>13/</sup> The Town devotes significant municipal resources to establishing the correct location of the lines, the use of proper materials, and the overall maintenance of the field and associated facilities.

Next, we consider whether your receipt of compensation from a private organization to perform services required by the permit and/or the Agreement would be “in relation to” those particular matters. In many circumstances, one’s private compensation is so closely associated with the relevant particular matter that there can be no debate about whether the private compensation is “in relation to” or “in connection with” the particular matter. For example, if one is being paid to prepare plans for submission to a municipal official for review and approval before construction can begin, one’s compensation is in relation to the decision to approve the plans.<sup>14/</sup> Similarly, if one is being compensated to obtain a building permit, one’s compensation is “in relation to” the permit or if one is being paid to be the primary party to implement an approved plan or the terms and conditions of a permit.<sup>15/</sup>

We acknowledge that, as a result of work being performed pursuant to a municipal permit, there may be opportunities for private compensation that do not violate the conflict of interest law. In *EC-COI-88-9*, for example, the Commission observed:

[A] municipal employee, who is one of many privately paid employees or independent contractors on a major construction project, and who has no responsibility for dealing with the town on any matter, might not be considered to be privately compensated ‘in relation to’ the permit which allows the construction. Furthermore, certain permits which authorize a major construction project (e.g., a zoning municipal reuse permit to convert a school building into [a condominium]) will not necessarily render all work done on the project, e.g., interior painting, ‘in relation to’ the permit.<sup>16/</sup>

Here, you are not being compensated to *obtain* the permit on behalf of a private party using an athletic field. Also you may be able to perform your work, on behalf of a private party, in a way that avoids your having to interact with the Town officials who grant and monitor compliance with the field use permits.

However, you are being privately compensated to implement the terms and conditions of the permit. You are being compensated to apply Town-approved paint in Town-approved places. Thus, the relationship between your compensation and your actions to meet Town requirements is not attenuated like that of a worker doing interior painting on a private home, the application

of which is not subject to municipal review and approval. In addition, for example, if the field is not cleaned up according to the permit, the private user will likely turn to you to ensure that the field is restored. The Town has devoted significant resources to maintaining public property that is used often by many parties and, to address risks to the Town, required private parties to have insurance.

The Town's interests in ensuring that its public resources are appropriately maintained, and that the health and safety of people using Town fields are ensured, are both direct and substantial.<sup>17/</sup> Your compensation for your work is directly connected to the particular matters because, by your work, you are ensuring that the organization meets its obligations to the Town pursuant to the Field Use Permit.

Accordingly, we conclude that G. L. c. 268A, § 17(a) will prohibit you from being paid by any private party to apply lines to athletic fields and perform any functions required under a Permit.<sup>18/</sup>

We note that there are ways that will enable you to comply with § 17. If your work were performed through your contract with the Town as part of your Town wages, as described in the Manual concerning overtime, you would be *directly* compensated by the Town, rather than by a private organization, in relation to the relevant particular matters. Alternatively, to allow you and other DPW employees to directly receive private compensation, a Town by-law would have to be enacted.<sup>19/</sup> In either case, these are arrangements that the Town will have to approve.

Finally, we note that § 23(e) of G. L. c. 268A, allows the Town "to establish and enforce additional standards of conduct."<sup>20/</sup> Thus, as the Manual indicates, if the Town has decided to prohibit a municipal employee from engaging in the type of outside employment you have described, regardless of whether § 17 bars your conduct in these circumstances, then you must abide by the Town's additional restrictions.

**DATE AUTHORIZED: February 3, 2005**

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<sup>1</sup> Manual, Section on "Overtime By DPW Staff."

<sup>2</sup> "Municipal employee, a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis . . . ." G. L. c. 268A, § 1(g).

<sup>3</sup> "Compensation, any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another." G. L. c. 268A, § 1(a).

<sup>4</sup> "Particular matter, any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding . . . ." G. L. c. 268A, § 1(k). Section 17(c) uses the phrase "in connection with" rather than "in relation to." For the purposes of our analysis here, we do not believe that these two phrases have legally distinguishable meanings or applications.

<sup>5</sup> Section 17(c) prohibits a municipal employee from acting (with or without compensation) as agent or attorney for anyone other than his municipality in connection with any particular matter in which his municipality is a party or in which it has a direct and substantial interest.

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<sup>6</sup> *EC-COI-99-7*.

<sup>7</sup> *Edgartown v. State Ethics Commission*, 391 Mass. 83, 89 (1984) (emphasis added in *Edgartown*) (quoting *Commonwealth v. Canon* 373 Mass. 494, 504 (1977), cert. denied, 435 U. S. 933 (1978) (Liacos, J., dissenting on other grounds).

<sup>8</sup> *Final Report, Special Commission on Ethics*, June 12, 1995, Preamble (as authorized by St. 1994, c. 43, § 49 and St. 1995, c. 2).

<sup>9</sup> Conflict of Interest and Federal Service, The Association of the Bar of the City of New York Special Committee on the Federal Conflict of Interest Laws (1960), p. 84.

<sup>10</sup> *EC-COI-03-2*.

<sup>11</sup> The preamble to G.L. c. 268A states, "A public official of a free government is entrusted with the welfare, prosperity, security and safety of the people he serves. In return for this trust, the people are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them." (emphasis added).

<sup>12</sup> *Commonwealth v. Canon*, 373 Mass. 494, 498 (1977).

<sup>13</sup> See e.g., *EC-COI-88-9*; *PEL 99-2*; *PEL 98-1*.

<sup>14</sup> See e.g., *EC-COI-87-31*; *PEL 98-1*; *PEL 99-2*.

<sup>15</sup> See e.g., *EC-COI-03-2*; *EC-COI-99-6*; *EC-COI-88-9*; *EC-COI-87-31*.

<sup>16</sup> *EC-COI-88-9*, quoting *EC-COI-87-31*. See also *EC-COI-93-5* (regarding § 4, the state level counterpart to § 17, the Commission concluded that certain duties of a pharmacist were not in connection with his employer's state operating permit because he was not the principal pharmacist and he did not have dealings directly with the state licensing board or other state agencies); and *EC-COI-90-13* (some positions within a wastewater treatment plant, such as internal plant security, maintenance of plant grounds, or mechanical equipment repairs, may not be in relation to the DEP permit regarding plant compliance).

<sup>17</sup> See e.g., *EC-COI-98-7* (the Commonwealth will have a direct and substantial interest in the particular matter under § 4 (the state level counterpart to § 17) if the particular matter affects the Commonwealth's legal rights or liabilities, pecuniary interests, property interests, or the Commonwealth may have a stake in the particular matter due to a significant interest that may not be financial or proprietary but may involve the devotion of substantial resources of the Commonwealth).

<sup>18</sup> You are also prohibited from acting as agent, with or *without* receiving private compensation, for private parties in connection with particular matters of direct and substantial interest to the Town or in which the Town is a party.

<sup>19</sup> See e.g., *EC-COI-92-10*.

<sup>20</sup> *EC-COI-96-1*.